

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	

COMMENTS OF ITTA

James M. Smith
Bradley W. Guyton
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
(202) 973-4288
jamesmsmith@dwt.com

Genevieve Morelli
President
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1519
gmorelli@itta.us

April 22, 2016

SUMMARY

The Commission's NPRM is untimely and ill-considered: it seeks to solve an old problem that a rapidly evolving marketplace and light-speed technological advances are already resolving. Adoption of the Commission's proposals at this time would only thwart consumer preferences, harm smaller MVPDs – including ITTA members that are relatively new entrants into a challenging and changing video marketplace – and lock into place an obsolete, 20th century, hardware-dependent approach that will only retard greater consumer choice and mobility as well as competition in video delivery systems.

First, the NPRM has not identified a problem that needs to be solved. The video distribution marketplace is positively bursting with new and innovative apps and services that are rapidly rendering the traditional set-top box superfluous. Consumers can and increasingly do choose from among a myriad of choices for delivery of their preferred video programming, at home or on the go, and MVPDs are joining this revolution as a matter of both opportunity and competitive necessity in response to consumer demand. The NPRM offers no reliable data to show that a problem truly exists: MVPDs are increasingly offering customers more options for obtaining their programming, and customers choose to either lease MVPD-supplied navigation devices (and enjoy customer support for them) or choose another way of obtaining programming as they wish.

Second, the NPRM's proposal would needlessly impose significant additional costs and burdens on MVPDs and consumers alike for a frozen technology that is likely to be outmoded and rejected by the consumer market by the time it can be implemented. Consumers would often need to obtain a second device, and MVPDs – especially smaller MVPDs like ITTA's members – would have to expend tremendous human and financial resources to change network

architectures, conduct testing, radically transform customer service and support, and accommodate as-yet undetermined standards fashioned by an organization that does not yet exist and may find consensus elusive. It would also thwart innovation in the creation of devices and applications that may not “fit” the Commission’s static mandated standards.

Third, there are good reasons for the existence of MVPD-supplied proprietary navigation devices and apps as one means of video programming delivery: namely quality control, contractual and licensing rights and obligations, integrity of advertising and copyrights, privacy, and security, to name a few. The NPRM virtually ignores all of these important concerns, imagining they can be magically solved by unrealistic chimeras such as self-certification. Allowing navigation device suppliers and others free access to programming, advertising and customer information could undo the programmer-MVPD relationship and result in significant economic harm, and invade the privacy of consumers – to the commercial advantage of OVDs and edge providers over whom the FCC has eschewed jurisdiction. It would also create a customer service nightmare for MVPDs who will have to address customer complaints and support service for foreign navigation devices not under their control, and for consumers who will demand answers and support and who will blame their MVPD for device-related problems and outages.

The Commission should step back, examine the costs and benefits of its proposals and alternative solutions, and at all costs refrain from hindering the advance of technology, the evolution of the video marketplace and the real interests and preferences of American consumers.

TABLE OF CONTENTS

I.	Introduction and Background	1
II.	The NPRM Proposals Are Unnecessary and Overbroad	2
	A. Competition and Consumer Choice for Both Video Services and Devices Exist and Are Growing	2
	B. The Commission’s Proposals Would Freeze Old Technology in Place	7
	C. The New Proposals Introduce Needless Complexity.....	10
	D. The Cost of the NPRM’s Proposed Changes Will Be Prohibitive for Smaller MVPDs and Will Deter Video Service Rollout.....	13
	E. Rapid Technological Change and Market Forces Will Render This FCC- Mandated Regime a Costly White Elephant.....	15
III.	The NPRM Proposals Would Differentially Harm Smaller and Newer MVPD Entrants Like ITTA Members.....	16
IV.	The Commission Cannot Achieve the Contractual and Security Protections It Envisions in Its Proposed Regime	17
	A. Moving to “Open” Systems and Away from Proprietary Devices Will Allow Non-MVPDs to Access and Monetize Consumer Data and Manipulate Advertising Beyond the Commission’s Reach	17
	B. The Proposed Regime Does Not Respect Existing Licensing Arrangements Between MVPDs and Content Providers.....	21
	C. The NPRM Proposals Are Inadequate to Prevent Security Threats	25
V.	The Proposed Mandates Would Trigger a Customer Service Nightmare.....	27
VI.	Proposed Solutions.....	28

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	

COMMENTS OF ITTA

I. INTRODUCTION AND BACKGROUND

ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) hereby submits its comments in response to the Commission’s *Notice of Proposed Rulemaking and Memorandum Opinion and Order* in the above-captioned proceedings (“NPRM”).¹

ITTA’s members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 45 states. All ITTA members provide video service to subscribers, utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure. Collectively, ITTA members serve over two million video subscribers in television markets across the United States.

In nearly all of these markets, ITTA members are new entrant multichannel video programming distributors (“MVPDs”) that compete head-to-head with other MVPDs such as DBS providers and at least one (and in some cases multiple) incumbent cable operators, as well

¹ *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42; CS Docket No. 97-80, 31 FCC Rcd 1544 (Feb. 18, 2016) (“NPRM”). See also *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Order, MB Docket No. 16-42; CS Docket No. 97-80 (Mar. 17, 2016) (ordering extension of comments and reply comments deadlines to Apr. 22, 2016 and May 23, 2016, respectively).

as with online video distributors (“OVDs”) such as Netflix, Google, Hulu, Amazon Prime Video, and others. ITTA members and other new entrant video providers have in recent years become a growing presence in the video distribution market because consumers have increasingly come to demand the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services.

Offering a video product with numerous and diverse broadcast and non-broadcast programming options that consumers desire, including content affiliated with other MVPDs, allows ITTA members to compete in today’s communications marketplace. Many ITTA members are much smaller and have far more limited resources than cable MSOs, national DBS providers and other MVPDs in the industry, which poses unique challenges in complying with the mandates proposed by the instant NPRM. Moreover, ITTA members are eager to deploy video services in additional geographic markets, but the costs of implementing the NPRM’s proposal – especially given already high (and escalating) content costs – could make it prohibitive for them to do so.

II. THE NPRM PROPOSALS ARE UNNECESSARY AND OVERBROAD

A. Competition and Consumer Choice for Both Video Services and Devices Exist and Are Growing

Even the most cursory review of the overall marketplace for video programming demonstrates that it is thriving in the United States. Consumers have more choice than ever, from traditional MVPDs like cable and satellite, newer MVPDs like ITTA’s member companies, and rapidly proliferating platforms like OVDs. In this last category, consumers can access a massive, virtually unlimited variety of video entertainment from providers like Netflix, Amazon

Prime, Hulu, and many more.² Many programmers also provide their own over-the-top services, such as HBO GO/HBO NOW³ or the recently announced Starz app, which allows users to stream Starz content or download it for use without an active Internet connection.⁴ And within most OVD services, consumers can choose from feature films, libraries of television shows, and original content like Netflix's *Daredevil* or Amazon's *Mozart in the Jungle*.⁵

These leading OVDs have been extremely successful, both in technical innovation and the development of quality content. Amazon, Netflix, Hulu and others have produced acclaimed content and generated massive amounts of buzz as their services have developed. The Commission's most recent Video Competition Report contains considerable discussion of OVDs, and suggests that the market is competitive and growing.⁶ The Commission explained that "the most significant trends since the last report include the continuing development, and consumer usage, of time and location shifted viewing of video programming, the expansion of digital and high definition programming, and the progress of the online video industry."⁷

Although the NPRM reflects an attempt to remedy a perceived lack of competition in the retail

² See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, MB Docket No. 14-16, 30 FCC Rcd 3253 (2015) ("*Sixteenth Video Competition Report*").

³ See HBO GO, <http://play.hbogo.com/> (last visited Apr. 17, 2016); HBO NOW, Here's How it Works, <https://order.hbonow.com/howitworks> (last visited Apr. 17, 2016); HBO NOW, What's the Difference Between HBO NOW and HBO GO?, <https://order.hbonow.com/nowvsgo> (last visited Apr. 17, 2016).

⁴ See Emily Steel, *With a Stand-Alone App, Starz Looks Beyond the Cable Bundle*, N.Y. Times (Apr. 4, 2016), <http://www.nytimes.com/2016/04/05/business/media/with-a-stand-alone-app-starz-looks-beyond-the-cable-bundle.html> (explaining that "[t]he hot and crowded market of subscription streaming services will get yet another entrant on Tuesday when Starz, the premium TV network, plans to introduce a stand-alone app available on Apple and Google devices," and noting that the new Starz app "offers downloads of most content and allows four people to stream simultaneously").

⁵ Some OVDs have quickly developed a reputation for delivering high quality original content, such as Netflix's *Orange Is the New Black* or Amazon's *Transparent*. See, e.g., Elizabeth Wagmeister, *'Mozart in the Jungle': Amazon's Low-Profile Series Shocks with High-Profile Wins at Golden Globes*, Variety (Jan. 10, 2016), <http://variety.com/2016/tv/news/mozart-in-the-jungle-golden-globe-wins-gael-garcia-bernal-1201676479/> (discussing the show's unexpected Best Comedy Series win at the 2016 Golden Globe Awards).

⁶ *Sixteenth Video Competition Report*, 30 FCC Rcd 3253 at ¶¶ 213-320 (2015).

⁷ *Id.* at ¶ 1.

navigation device market and not the video marketplace in general, the two go hand-in-hand, especially in today's swiftly moving technological world. Given the significant success these new entrants to the video landscape have already experienced, it is difficult to believe that they need the sort of regulatory helping hand that the NPRM's proposals would extend.

Moreover, MVPDs and OVDs alike have developed innovative ways to get their video programming to their customers, both at home and wherever they go. Consumers can access video services on any number of devices, including MVPD-provided set-top boxes, third-party boxes (like Roku, Apple TV or Amazon Fire TV)⁸ and other devices (*e.g.*, video game consoles like Sony PlayStations, specialty devices like Slingbox, and smart TVs).⁹ Of particular significance to the current inquiry, MVPDs, including ITTA members, now provide apps that transform the video experience that subscribers could previously only experience at home into one that consumers can enjoy on tablets, smartphones and other devices that can go anywhere.¹⁰

⁸ See, *e.g.*, Roku, Home Page and Product Overview, <https://www.roku.com/> (last visited Apr. 18, 2016); Apple, Apple TV, The Future of Television Is Here, <http://www.apple.com/tv/> (last visited Apr. 18, 2016); Amazon, Amazon Fire TV, <http://www.amazon.com/Amazon-DV83YW-Fire-TV/dp/B00U3FPN4U> (last visited Apr. 18, 2016).

⁹ See, *e.g.*, Sony, PlayStation 4, <https://www.playstation.com/en-us/> (last visited Apr. 18, 2016); Slingbox, Home Page and Product Overview, <http://www.slingbox.com/> (last visited Apr. 18, 2016); John R. Quain, *Smart TVs: Everything You Need to Know*, Tom's Guide (Nov. 12, 2015), <http://www.tomsguide.com/us/smart-tv-faq,review-2111.html>; see also Sixteenth Video Competition Report at ¶ 213 ("Consumers can access online video via multiple Internet-enabled devices, including computers, smartphones, tablets, gaming consoles, television sets, and other equipment.").

¹⁰ See Downloadable Security Technology Advisory Committee (DSTAC) Report at 206-09 (discussing how MVPDs support various devices, including iOS and Android smartphones and tablets, Windows and Mac computers, Smart TVs, game consoles and media adaptors) ("DSTAC Report"), available at <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>. MVPD apps, of course, also work on devices intended for televisions like Roku or Xbox and PlayStation, as well as ubiquitous iPads or Android smartphones. See DSTAC Report at 206 ("All of the major MVPDs support an iOS and Android App to access their service on smart phones and tablets. All of the major MVPDs support their service on Microsoft Windows and Apple Mac OS X either through an application or a Web app (using a plug-in model for content protection today and transitioning to an HTML5 EME Web App in the future). Some of the major MVPDs support Smart TVs (LG, Samsung, Sony, Toshiba), game consoles (PlayStation 3 & 4, Xbox 360 & One), and media adaptors (Roku)."); *id.* at 208 Table 8 (showing retail devices on which MVPD apps run).

For example, ITTA member company CenturyLink offers its subscribers the CenturyLink Prism app for use on iOS, Android, and Roku devices.¹¹ Prism allows subscribers to stream a selection of live programming both at home and on the go, watch video on demand (VOD) programming, and schedule Prism DVR recordings remotely.¹² Another ITTA member, Frontier, offers a similar app, FrontierTV, which allows subscribers to stream live channels and view the programming guide via their iOS or Android devices.¹³ Similarly, ITTA member TDS offers TDS TV Everywhere, which allows subscribers to access a selection of VOD programming or stream live content via any Internet-connected device.¹⁴ These and other MVPD products provide access to linear programming, VOD, and other features of MVPDs' overall suite of services, while protecting programmers' valuable content and preserving content providers' preferences like channel neighborhood and advertising permissions.

OVD services have also embraced the apps approach. Boxes like Roku feature apps running in the Roku user interface, as OVDs like Netflix and Hulu provide their own apps through which customers can access their content.¹⁵ The integrated search capability that appears to be a major Commission goal in this proceeding is already happening on Roku and other platforms.¹⁶ A Roku user can simply navigate to the Search menu option, type in the

¹¹ See CenturyLink, Prism TV App Supported Devices, <http://www.centurylink.com/help/?assetid=142> (last visited Apr. 17, 2016).

¹² See CenturyLink, Prism TV App FAQs, <http://www.centurylink.com/help/?assetid=181> (last visited Apr. 17, 2016).

¹³ See FrontierTV Everywhere, <https://tv.frontier.com/> (last visited Apr. 21, 2016).

¹⁴ *TDS TV Everywhere Now Available*, TDS Connect Blog (May 30, 2014), <http://blog.tdstelecom.com/products/tds-tv-everywhere-now-available/>.

¹⁵ Roku refers to the apps running via its user interface as “channels” and claims to have more than 3,000 channels available. See Roku, See What’s On, <https://www.roku.com/whats-on> (last visited Apr. 18, 2016).

¹⁶ See, e.g., Roku, How It Works: Find What You Want. Fast, <https://www.roku.com/how-it-works> (last visited Apr. 18, 2016) (explaining how to “[s]earch through the widest selection of channels — by actor, title, or director, using remote, Roku mobile app, or the all new voice search”).

movie or show she's interested in, and quickly scan all of the Roku apps where the content is available, whether via MVPD or OVD, or whether it is included as part of a subscription, as a rental, or available to purchase. On a device like an iPad, Amazon Video or Showtime Anytime apps sit side-by-side with Yelp, Dropbox, Fruit Ninja, and thousands of other non-video apps.

Moreover, MVPDs are beginning to partner with OVDs and device manufacturers to provide integrated services without set-top boxes. For example, Time Warner Cable is collaborating with Roku to provide customers with a suite of services delivered through a Roku player, eliminating the traditional set-top box and its associated monthly fees altogether.¹⁷ And just this week, Comcast announced that it would soon be rolling out its new Xfinity TV Partner app for Roku TVs, Roku streaming players and Samsung smart TVs.¹⁸ With the new app, which will also be made available to other device manufacturers, Comcast subscribers will be able to access their video services – including the Xfinity guide, live and VOD programming, as well as cloud DVR recordings – without an MVPD-provided set-top box.¹⁹

Simply put, in today's video landscape, consumers have any number of options, including using just their MVPD service; supplementing their MVPD subscription with OVD; becoming a “cord-shaver” by cutting back on MVPD services and replacing them with OVD options;²⁰ cutting the cord entirely; or opting to be a “cord-never” by foregoing MVPD services

¹⁷ See Time Warner Cable, Roku Trial from Time Warner, <http://www.timewarnercable.com/en/enjoy/roku.html> (last visited Apr. 20, 2016).

¹⁸ Janko Roettgers, *Comcast Announces Xfinity Apps for Samsung Smart TVs, Roku Streamers*, VARIETY (Apr. 20, 2016), <http://variety.com/2016/digital/news/comcast-xfinity-tv-roku-samsung-1201757609/>.

¹⁹ See Press Release, Comcast, Comcast and Roku Bring Xfinity TV Partner App to Roku TVs and Roku Streaming Players (Apr. 20, 2016), <http://corporate.comcast.com/news-information/news-feed/comcast-and-roku-bring-xfinity-tv-partner-app-to-roku-tvs-and-roku-streaming-players>.

²⁰ See *Sixteenth Video Competition Report* at ¶ 84.

and using solely OVD services.²¹ With any of these options, consumers' selected content is available to them on non-MVPD devices via apps provided by both MVPDs and OVDs.

B. The Commission's Proposals Would Freeze Old Technology in Place

As described above, MVPDs, OVDs, and especially consumers are quickly moving away from clunky set-top boxes; indeed, the very term is quaint and outmoded, inasmuch as set *tops* scarcely exist anymore in an era of tablets and flat-screen TVs. The Commission's approach, however, looks backward. Although the NPRM explains that its proposals apply to apps as well as physical devices, the Commission's new plan is indisputably hardware-centric. Among other things, as discussed more fully below, the NPRM's core proposal would often require the installation of a new gateway device in consumers' homes, due to technological limitations in getting the requisite "Information Flows" from MVPD networks to third-party devices. Adding a second box is emphatically *not* what consumers want.

MVPDs are striving to meet consumer demand and are shifting as quickly as consumer tastes allow to a paradigm where apps deliver content to consumers wherever they are, and on whatever device they prefer. This is happening now and is only picking up steam. As the recent Downloadable Security Technology Advisory Committee ("DSTAC") Report explains, "[t]he application approaches abstract the diversity and complexity of service providers' access network technologies and customer-owned IP devices, accommodate rapid change and innovation by both service providers and consumer electronics manufacturers, and may make use of a combination of software-downloadable security with hardware roots of trust."²² Curiously,

²¹ *Id.* at ¶ 83.

²² DSTAC Report at 29.

though, the Commission’s suggested approach would put the brakes on this momentum and nudge the industry back towards yesterday’s technology.

Given how the apps-based video services economy has evolved in the past few years, it is puzzling that the FCC has proposed these new rules now. The NPRM evinces the Commission’s perception that the market is moving too slowly and without enough competitive choice.²³ But just a few years ago, many of the products that we now take for granted – like Roku, Chromecast, or Fire TV, all of which have sold millions of units²⁴ – were either nonexistent or in their infancy. The market is in fact moving quite quickly, as consumer access to pay TV becomes more flexible, more mobile, and more available than ever. Rather than accelerate innovation, the Commission’s proposal would actually slow things down. This latest flavor of “AllVid” requires MVPDs (and third-party developers) to stop in their tracks and build to an as-yet undefined standard rather than allowing them to continue innovating at their current fast pace. Building to the standard (when finalized at some unknown point), much like teaching to the test, would tamp down the type of creativity that is moving MVPD services in exciting new directions. As many years of experience has shown, complying with tech mandates like CableCARD, IEEE 1394/FireWire or any number of other top-down technological directives only puts sand in the gears and stymies innovation.²⁵

²³ See NPRM at ¶¶ 13-14, 16.

²⁴ See Jeff Baumgartner, *Chromecast Led OTT Device Market in 2015: Study*, MULTICHANNEL NEWS (Mar. 8, 2016), <http://www.multichannel.com/news/content/chromecast-led-ott-device-market-2015-study/403141> (“Based on cumulative shipments, the Apple TV, with 37 million units shipped since 2007, still leads the pack, though the Chromecast, at 27 million units shipped and coming off the introduction of a new model, is making up ground, followed by Roku players and the Roku Streaming Stick (20 million), and the Amazon Fire TV (less than 10 million).”).

²⁵ See, e.g., NPRM at ¶¶ 7-8 (discussing shortcomings of the CableCARD regime); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices et al*, Third Report and Order and Order on Reconsideration, CS Docket No. 97-80; PP Docket No. 00-67 et al, 25 FCC Rcd 14657 ¶ 1 (2010) (discussing efforts to “remedy shortcomings in our CableCARD rules in order to improve consumers’ experience with retail navigation devices (such as set-top boxes and digital cable-ready television sets) and CableCARDS, the

The Commission’s proposal, in which MVPDs would be required to build to mandated standards rather than working within their own dynamic ecosystem, would have the practical effect that consumers would likely have to wait much longer for updates, upgrades, and new features to flow through.²⁶ Not only would MVPDs need to take more time to apply these changes to their network, hardware and apps; everybody from MVPDs to subscribers would need to wait while downstream third parties proceed to revise their own devices and apps. Moreover, in any situation where an MVPD attempted to develop new features that could not be accommodated by the mandated retail boxes and/or apps – if, for instance, the new feature was not considered a “Navigable Service” and thus not included in the “Information Flows” – the MVPD’s customers using those boxes or apps would never see that benefit, and probably would never even know that the feature existed.²⁷

Along similar lines, the Commission’s proposed parity rule would have the unintended consequence of disincenting innovation of this nature, because any new features or services the MVPD wished to introduce for customers using its own hardware or apps would need to be made available to all third-party devices and apps.²⁸ Rather than squandering scarce resources on the inevitable troubleshooting process to conform the new features to the prevailing standards to enable them to work on every third-party device, it would be far more rational for the MVPD to

security devices used in conjunction with navigation devices to perform the conditional access functions necessary to access cable services”); *id.* at ¶ 43 (eliminating previous rule requiring cable operators to include an IEEE 1394/FireWire interface on all high-definition set-top boxes).

²⁶ See, e.g., DSTAC Report at 292 (“Application and feature updates [by MVPDs] are occurring multiple times a month, effected with an application update, as consumers have grown accustomed to on tablets and smartphones. The Device Proposal [upon which the proposed rules are based] accepts only the raw linear and VOD that passes through its limited interface with no mechanism for updates or improvements.”); see also *id.* at 293 (“Nor can MVPDs invent around the interfaces. The protocols are fixed, but business models and entitlements change rapidly.”).

²⁷ See *id.* at 292 (“A customer that accesses only disaggregated portions of the MVPD’s service under the Device Proposal would thus remain stuck in the past, potentially unaware of new distinctive differences in features, offerings, and look and feel of their MVPD’s service.”).

²⁸ See NPRM at ¶¶ 63-69.

simply forego developing the new features at all. In this very predictable scenario, everyone loses out.

C. The New Proposals Introduce Needless Complexity

The Commission’s proposal, which requires MVPDs to make three “Information Flows” available to third-party devices and apps, will require numerous changes to MVPDs’ networks and delivery mechanisms.²⁹ Today, MVPDs have engineered and optimized their networks to provide their services to customers as effectively as possible, utilizing diverse technological approaches.³⁰ These include differences in security, physical infrastructure, codecs, and distribution platforms.³¹ According to the DSTAC Report:

Different networks use different approaches to optimize their technology for delivering competitive service. MVPD service is not a collection of “content items” and “micro-services.” Most MVPD apps will or have the capability to hit multiple servers for data necessary to provide the service as an integrated whole. Different networks use different approaches for sound technical reasons. It is no trivial task to create and utilize an interface different than the one that has been optimized for the MVPD’s specific network.³²

It is inevitable that changes to current architectures will be necessary to produce the “Information Flows” in the manner contemplated by the NPRM. In addition, despite the Commission’s assertion that it wants to save consumers money and simplify how they receive MVPD programming, the proposal will in many cases require the introduction of a second

²⁹ See *id.* at ¶¶ 35-40; DSTAC Report at 286-87 (“The Device Proposal acknowledges that it is unacceptably burdensome to rebuild all MVPD systems. But the Device Proposal does not take account of the technological differences among them, and thus would require exactly that kind of rebuild to engineer a Virtual Headend, widgets apps, and other unspecified technologies.”).

³⁰ See DSTAC Report at 30-31, 141-43 (discussing the various distribution technologies currently in use among MVPDs).

³¹ See *id.*

³² *Id.* at 287.

device into consumers' homes. Due to existing network architecture and already deployed technologies, many MVPDs will have no choice but to turn to a hardware solution to meet the requirements of the NPRM. As DSTAC has explained, the conversion of proprietary content delivery mechanisms to the proposed "Information Flows" via whatever specifications emerge will not be trivial. While, ideally, this would all be done via simple software tweaks and adjustments at the margins, given available resources and existing technology, many MVPDs will have to resort to installing a gateway device to provide the three "Information Flows" to third-party devices, particularly in the short run.³³

Even as it inadvertently perpetuates "old" technology, the NPRM's mandated "new" technology doesn't even currently exist. As the NPRM acknowledges, for the proposed new AllVid system to work, consensus on technical standards and specifications must be attained by an "open standards" organization.³⁴ Although the NPRM seems to imply that this would be simple and straightforward,³⁵ this step alone will be difficult to achieve. The Commission expects this standards body to settle in short order on a workable standard, even though last year's DSTAC, which was itself mandated by law, could not come to an agreement on competing approaches.³⁶

³³ See, e.g., *id.* at 286 ("The Device Proposal does not even support linear channels within its own terms. It explicitly acknowledges reliance on 'prosthetic' auxiliary devices for satellite and IPTV, at the very least – meaning more boxes (and more energy consumption). It also assumes a separable tuning adapter box to support cable SDV, rather than considering an application based approach that has already solved this problem. These additional MVPD-provided devices would be required for any consumer who sought to use a retail device in their home."); see also NPRM at ¶ 65 ("We recognize that DBS providers specifically will be required to have equipment of some kind in the home to deliver the three Information Flows over their one-way network, even if they also provide programming to devices connected to the Internet via other networks.").

³⁴ See NPRM at ¶ 41.

³⁵ See *id.*

³⁶ See DSTAC Report at 1-6 (listing limited set of points of agreement but noting that "DSTAC is not reporting a consensus recommendation" and explaining numerous ways in which the factions within DSTAC were split).

It will take much time, resources and harmonization of competing approaches for this standards body to come to agreement. But neither the standards body itself nor its composition has even been determined.³⁷ The Commission implies that it has one in mind, but even this basic aspect of the proposal remains nebulous.³⁸ Moreover, the NPRM seems to require MVPDs to be the driving force behind the standards process, but remains vague on the role for third-party device and app providers.³⁹ It also remains unclear how the standards-setting process will be impacted each time MVPDs develop new features or technology that would benefit their customers. Will MVPDs have to grapple with the standard-setting (or revision) process every time they want to tweak their offerings? Although the standards process was presumably intended as a means to accelerate technological advances, it seems likely that it will instead constrain innovation in this fast-changing marketplace.

Even after standards are set and specs are in place, the development cycle for new devices and protocols must still take place. It is reasonable to assume that it will take considerable time for many MVPDs, currently utilizing a variety of different technologies, to engineer compliant solutions.⁴⁰ Technology changes of the magnitude suggested by the Commission's proposal do not happen overnight; instead, years of planning, testing, and staged roll-out will be necessary. The NPRM expresses the hope that the eventual solution will be off-the-shelf and may already be available in some form.⁴¹ But this blithe assumption ignores the

³⁷ See NPRM at ¶ 41.

³⁸ See *id.* (“We believe that there is at least one body that meets this definition [of “Open Standards Body”] but invite commenters to provide examples of such bodies.”).

³⁹ *Id.* at ¶¶ 41-44.

⁴⁰ See DSTAC Report at 30-32 (discussing the various types of distribution technologies and conditional access currently deployed and in use by various types of MVPDs).

⁴¹ See NPRM at ¶ 43 (proposing to require compliance within two years of adoption of the new rules, based primarily on “Competitive Navigation” advocates’ claims that specifications exist that “could achieve the

vast amounts of complexity beneath the surface, as was thoroughly documented last summer in the DSTAC Report.⁴²

D. The Cost of the NPRM's Proposed Changes Will Be Prohibitive for Smaller MVPDs and Will Deter Video Service Rollout

At a time when video represents a declining revenue stream for MVPDs as programming costs rise and OVDs' streaming services proliferate,⁴³ the potential cost of the new AllVid proposal to MVPDs is a serious concern. This applies with even greater urgency to smaller MVPDs like ITTA members, which are newer entrants to the video services landscape and seek to expand into additional geographic markets and introduce new services. The proposal would impose many new costs on MVPDs, whether or not video is profitable or their principal line of business, including costs attributable to:

- participation in the standards process;
- development and engineering to comply with newly created standards and technical specifications;
- testing and implementation; and
- infrastructure and network modifications.⁴⁴

Moreover, that only covers the process up to the "Information Flows" handoff. Once the AllVid tap is flowing freely, MVPDs will face new costs and diminished revenues related to increased bandwidth, advertising decreases, programming negotiations, increased customer

Competitive Navigation proposal today" and their "claim that 'any necessary standardization, if pursued in good faith, should take no more than a single year'").

⁴² See generally DSTAC Report at 30-32, 141-43, 286-87.

⁴³ See, e.g., Scott Moritz, "Verizon Changes the Channel on FiOS in Shift to Internet TV," Bloomberg BNA Telecom Now: Tech & Telecom (Apr. 20, 2016), <http://teln.bna.com/verizon-changes-the-channel-on-fios-in-shift-to-internet-tv/> ("Verizon Communications Inc. is plotting a new strategy for video as its slow-growing FiOS TV business looks increasingly like a costly relic of the cable era and out of step with the trend toward "skinny bundles" and streaming video. . . And there are signs customers could start to drop the service. . . While Verizon's broadband Internet business continues to grow, the slowdown of FiOS TV highlights the pressures facing pay-TV providers as consumers migrate to online-streaming offerings like Netflix Inc. and Amazon.com Inc. and forgo cable and satellite packages all together.")

⁴⁴ See, e.g., DSTAC Report at 286-87, 292-95.

support requests, and third-party device and app provider inquiries. There also is the opportunity cost of meeting the demands of this new technical mandate while foregoing development outside the new FCC-mandated system. These added costs can and will affect ITTA members' decisions to enter new markets and expand video service offerings.

The NPRM contains no support from any sort of detailed study, undertaken by the Commission or otherwise, of the costs involved in its proposal.⁴⁵ Nor does it even establish that MVPD subscribers prefer buying their own navigation devices, rather than renting them (and typically enjoying included service and support) from their MVPDs.⁴⁶ This on its own suggests that the proposed rules may be arbitrary and capricious, but worse yet, it leaves MVPDs – especially smaller ones with fewer internal resources – in no position to estimate what all of this is going to cost them. As discussed above, the standards have not yet been developed, the paradigm is not fully formed, and at this point, everything is a best guess.

Most importantly, the ultimate cost of the proposals would be borne by consumers. It may be easy to succumb to the blue-sky nature of the proposal's purported benefits and overlook the reality that MVPDs will be required to do a lot of work and incur many expenses to implement the proposed system. Unfortunately, those costs must be recouped somehow, which means that consumer prices are likely to increase. And it will be consumers in ITTA members' predominantly rural service areas who will be affected most significantly.

⁴⁵ With respect to the cost of set-top box rentals, the NPRM relies entirely on a press release by Sens. Markey and Blumenthal relating to a survey of "large MVPDs." That survey evidently sought no information on the costs of providing and supporting navigation devices. *See* NPRM at ¶ 13.

⁴⁶ Time Warner Cable, for instance, has long offered customers the option of purchasing rather than renting cable modems in order to receive its high speed broadband service, but only 14% of its customers have chosen the purchase option. *See* Raymond James Technology & Communications U.S. Research, "*FCC Set Top Box Proposal Commentary*," filed in MB Docket No. 16-42 (Apr. 11, 2016) (*ex parte*), at 5 ("Raymond James Research Report").

E. Rapid Technological Change and Market Forces Will Render This FCC-Mandated Regime a Costly White Elephant

Adding unnecessary complexity and cost to the market for video services is unappealing on its own. When one factors in the time that will be necessary to bring AllVid 2.0 to fruition, the flaws in the proposal become all the more glaring. In the several years needed to implement the Commission's proposal, the video landscape is certain to change dramatically, as it has year over year in the past decade. This rapidly changing marketplace makes the risks of intervening with static rules much greater, because the Commission risks chilling innovation and locking into place technical standards that may soon become obsolete. Given the enormous changes in video services and apps available in the past two years alone, it is far from hyperbolic to suggest that the AllVid regime might be dead on arrival when it is finally implemented.

Even if the new system falls into place just two years into the future, as suggested by the NPRM, consumers are highly likely to have already moved on from the old hardware-centric model – except to the extent that the new FCC mandates prevent that from occurring. Whether, in two years' time, everything available from video service providers will be served to customers' big screen TVs and handheld smartphones alike via apps like the ones currently offered or on the way from MVPDs, or whether the industry will have gone in another technological direction entirely, the Commission's proposed regime will likely prove to be an obsolete and unwelcome relic of a bygone era.

III. THE NPRM PROPOSALS WOULD DIFFERENTIALLY HARM SMALLER AND NEWER MVPD ENTRANTS LIKE ITTA MEMBERS

The Commission has acknowledged, albeit briefly, that some mitigation of the hardships the proposed rules will impose on smaller entities is appropriate.⁴⁷ Although the new AllVid plan is likely to have a detrimental effect on all MVPDs, it should be evident that while large cable MSOs may be able to spread costs and otherwise mitigate the harmful impacts of the requirements imposed under the NPRM, smaller MVPDs cannot. ITTA member companies are often the most recent and typically the third, fourth or fifth entrant in their video services markets, and thus occupy a more precarious competitive position than the already entrenched cable and satellite providers. Smaller MVPDs do not have the R&D, engineering, testing, or technical support resources that larger national players have, so meeting the eventual standards of the standard-making body will be a much heavier and more costly lift.

Further, many of the larger MVPDs are farther along on the IP conversion process than smaller MVPDs. DSTAC's Working Group 4 noted "the diversity of MVPD network technologies and architectures" and explained that, "[b]ecause of that diversity, while MVPDs are adding IP delivery to their service, they are not all doing so at the same pace or through the same architectural approach."⁴⁸ The NPRM suggests that the "Information Flows" and the standards that will eventually emerge will not preclude participation by entities with less advanced technical infrastructure.⁴⁹ That may be true, but larger MVPDs with more advanced technology assets will be better positioned to comply with new standards than smaller entities,

⁴⁷ See NPRM at ¶ 81 (seeking comment regarding effects on small MVPDs).

⁴⁸ DSTAC Report at 287.

⁴⁹ See NPRM at ¶ 81 ("The American Cable Association also asserts that many of its members are not prepared to transition soon to delivery of their services in Internet Protocol, but we note that our proposed rules do not require MVPDs to use Internet Protocol to deliver the three Information Flows or Compliant Security System.").

often in more rural areas with older network architectures, that are working through earlier stages of IP conversion.⁵⁰

As it is, video is a declining revenue stream or even a loss leader for MVPDs, including smaller MVPDs such as ITTA members.⁵¹ The new costs discussed above will be onerous for MVPDs of all types, but especially painful for smaller entities. Given the rising costs of programming and the increasing competitive inroads from OVDs, new costs resulting from the Commission's proposed mandates will put an additional squeeze on small MVPDs. In recent years, MVPDs have invested significant resources into new technologies and apps. Initiatives of this nature may be expensive, but they are necessary to keep up with the rapidly changing competitive marketplace. As such, smaller MVPDs must prioritize the way they spend their limited resources, directing those resources toward innovation and competitive concerns, rather than complying with superfluous technological mandates.

IV. THE COMMISSION CANNOT ACHIEVE THE CONTRACTUAL AND SECURITY PROTECTIONS IT ENVISIONS IN ITS PROPOSED REGIME

A. Moving to “Open” Systems and Away from Proprietary Devices Will Allow Non-MVPDs to Access and Monetize Consumer Data and Manipulate Advertising Beyond the Commission’s Reach

There are many reasons why MVPDs utilize proprietary set-top boxes or MVPD-provided apps to transmit their programming to subscribers, or otherwise attempt to protect that content in various ways. Among these are licensing terms and conditions negotiated with programmers, copyright concerns, and network security issues that are given short shrift by the NPRM. Additionally, MVPDs – but not OVDs – are subject to FCC privacy rules that require

⁵⁰ See Raymond James Research Report at 5 (“Making this transition requires considerable capital investment and operators have disclosed strategies that allow for a gradual transition”). See generally *id.* at 4-5.

⁵¹ See note 43 *supra*.

them to protect subscriber data.⁵² The NPRM waves privacy concerns away with a nod to “self-certification.”⁵³ The NPRM acknowledges that its self-certification concept for protecting consumer privacy remains undeveloped, and fails to explain how self-certification by third-party developers will somehow allow MVPDs to police bad actors they cannot control.⁵⁴ Even in expressing overall support for the Commission’s proposals, the Obama Administration, through the NTIA, has called attention to this significant flaw in the Commission’s thinking:

[T]he Commission should take steps to ensure that expansion of competition in navigation devices does not diminish existing privacy protections for multichannel video programming subscribers. Providers of devices – whether MVPDs or others – will have access to large amounts of personal information about the users of those devices, not limited to the programming that they search for, watch, or purchase. MVPDs generally have more rigorous statutory obligations concerning their collection and use of personally identifiable subscriber information than do non-MVPD providers of navigation equipment.

The Commission has proposed to address these concerns via a licensing process, whereby MVPDs “authenticate and provide the three Information Flows only to Navigation Devices that have been certified by the developer” to comply with the MVPD’s privacy obligations. This approach has appeal, but leaves important

⁵² See, e.g., 47 U.S.C. § 222 (privacy rules applicable to telecommunications carriers); 47 U.S.C. § 551 (privacy rules applicable to cable operators); 47 U.S.C. § 338(i) (privacy rules applicable to satellite carriers). For example, telecom carriers are subject to the Commission’s CPNI rules (47 CFR §§64.2001 *et seq.*), and cable operators must protect subscribers’ viewing history and personally identifiable information (“PII”), inform them of the PII that the MVPD collects, and follow strict rules regarding the disclosure of PII. See 47 U.S.C. § 551. Further, the Commission’s pending broadband privacy NPRM proposes new rules will apply to all ISPs, including telcos and cable operators, and further proposes to “harmonize” (*i.e.*, expand) the aforementioned existing rules to conform to a new, broader FCC privacy regime. See *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, FCC 16-39 (rel. Apr. 1, 2016) (“Broadband Privacy NPRM”).

⁵³ See NPRM at ¶ 73.

⁵⁴ See *id.* at ¶ 74 (“We seek comment on the best way to implement such a certification process. Should this be a self-certification process, or are there viable alternatives to self-certification? For example, should there be an independent entity that validates the competitor’s certification? Should we develop a standardized form? Who would be responsible for maintaining a record of the certification?”).

questions to be addressed – most importantly, who will ensure compliance with a certification and through what legal authority.⁵⁵

As NTIA recognizes, the parameters of the Commission’s proposal necessarily involve third party access to private subscriber data, since, among many other things, VOD is included among the “Navigable Services” that MVPDs must hand over.⁵⁶ Under the proposed rules, however, an MVPD has no ability to determine how a third-party device manufacturer might use records generated when, for example, subscribers purchase VOD titles through a non-MVPD device. Notably, as the Commission recently explained and Chairman Wheeler emphasized in the context of the Commission’s new broadband privacy rulemaking, the FCC has eschewed jurisdiction over OVDs and edge providers.⁵⁷

The same is true here: the FCC simply does not intend to extend its jurisdiction to the third parties that will interact with, utilize, and benefit from MVPD content. NTIA asks “stakeholders” to propose adequate protections, and Chairman Wheeler has even accused concerned parties (presumably not including NTIA) of using privacy and copyright concerns as a “smokescreen for their overall opposition” while challenging them to “write language to accomplish our goal of protecting copyright and privacy.”⁵⁸ But in fact the Commission has presented MVPDs with a Catch-22: its declarations that it will not apply privacy and other regulation to OVDs and edge providers checkmate MVPDs and programmers, by making it

⁵⁵ *Ex parte* letter from Lawrence E. Strickling, NTIA, to Chairman Wheeler, MB Docket No. 16-42 (Apr. 14, 2016), at 5.

⁵⁶ *See* NPRM at ¶ 26 (“We propose a rule to define these “Navigable Services” as an MVPD’s multichannel video programming (including both linear and on-demand programming)....”).

⁵⁷ *See* Broadband Privacy NPRM at ¶ 4 (rel. Apr. 1, 2016). *See also* Statement of Chairman Tom Wheeler at 2 (“To be clear, this is not regulating what we often refer to as the edge—meaning the online applications and services that you access over the Internet...”).

⁵⁸ Remarks of FCC Chairman Tom Wheeler to INCOMPAS Policy Summit, Apr. 11, 2016, at 4.

impossible for them to look to the FCC to enforce against violations arising from the non-MVPD access that the NPRM would accord.

Further, under this “AllVid Redux,” non-MVPDs will be able to overlay MVPD content with new or different advertising that was not contemplated by content providers. This may run afoul of negotiated advertising constraints and, at least under the proposed rules and existing Commission jurisdiction, there will be little to be done about it. Chairman Wheeler has asserted that third parties would not be able to manipulate MVPD content for advertising purposes.⁵⁹ But the proposed rules are silent on the issue and the NPRM simply says that “[w]e do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content.”⁶⁰

The concerns of MVPDs are shared by consumers, who are uneasy about the prospect of companies like Google gaining untrammelled access to their television viewing habits.⁶¹ Similarly, consumers are not eager to see personal data regarding their online activities mined and repurposed to serve up ads on their video services. According to a Digital Citizens Alliance

⁵⁹ See Monty Tayloe, *FCC Launches Set-Top Box Rulemaking by 3-2 Party Line Vote*, Communications Daily (Feb. 19, 2016) (“The proposed rules will prevent third-party device manufacturers from overlaying or adding their own advertisements to the pay-TV content stream, Wheeler said. The proposal will preserve ‘the sanctity of content,’ he said in response to programmer concerns about third parties such as Google running ads on content they haven’t licensed.”).

⁶⁰ NPRM at ¶ 80.

⁶¹ See Press Release, Digital Citizens Alliance, *Americans Fear Privacy Intrusion from FCC Set-Top Box Proposal, According to New Survey* (Apr. 20, 2016), available at <http://www.prnewswire.com/news-releases/americans-fear-privacy-intrusion-from-fcc-set-top-box-proposal-according-to-new-survey-300254556.html>.

survey, nearly three-quarters of respondents said “it would bother them if ads related to their private activities on their phone and laptop showed up on their living room television.”⁶²

There are no protections in the proposed regime regarding the ability of third parties to block, add to, or remix advertising already inserted into MVPD content, nor is there anything to stop Google or some other entity from selling additional ads to run alongside MVPD programming with no compensation or input to the MVPD or the original programmer. Simply put, this is unreasonable and provides far too much free reign for third parties with no accountability to consumers, MVPDs, programmers or the Commission.

B. The Proposed Regime Does Not Respect Existing Licensing Arrangements Between MVPDs and Content Providers

Similarly, as it stands in the NPRM and the accompanying proposed rules, the Commission would throw open MVPD content for use by third parties, unfairly allowing non-MVPDs to evade the cost of licensing such programming. In this brave new world, entities like Google, Apple, Amazon, and many others will be permitted to repackage highly valuable content without those non-MVPDs having to actually go to the trouble of negotiating their own licensing deals. In essence, Google would be authorized by the Commission to “provide” users of their own Google-branded set-top box (or app) premium content like *Better Call Saul*, even if Google had heretofore been unable to negotiate its own rights agreement with AMC or Sony Pictures Television.⁶³ As the Raymond James Research Report concludes: “In effect, the NPRM envisions a world where the content is given up without a contract.”⁶⁴

⁶² *Id.*

⁶³ See Peter Burrows, Lucas Shaw and Gerry Smith, *Apple Said to Delay Live TV Service to 2016 as Negotiations Stall*, Bloomberg Technology (Aug. 13, 2015), <http://www.bloomberg.com/news/articles/2015-08-13/apple-said-to-delay-tv-service-to-2016-as-negotiations-stall> (explaining that talks to license programming “with CBS, Fox and NBC, owned by Comcast Corp., have been mired for the past several months”); Christopher S. Stewart and Shalini Ramachandran, *Google Pitches Online TV Service to Media Companies*, Wall St. J. (July 16, 2013),

Under the proposal, Google would not have to negotiate or pay for the rights to a given program – or, for that matter, an entire network’s worth of programming – but will be unconstrained from running its own advertising against it,⁶⁵ compiling its own data regarding subscriber viewership of the program,⁶⁶ and so on. In short, the proposed regime allows third parties to ignore the complicated licensing that MVPDs and content providers have traditionally negotiated, creating an FCC-sanctioned end run around the normal content provider/MVPD licensing paradigm.

Worse yet, the privilege does not flow both ways. The new rules do not force Amazon or Netflix to open their application program interfaces (“APIs”) to MVPDs, nor do they allow MVPDs to put OVD video on their services as they please. Under the new rules, MVPDs would continue to have to license rights to content from OVDs, just as they do today. Just days ago, Cablevision announced that it would provide Hulu to subscribers as a standalone channel to its

<http://www.wsj.com/articles/SB10001424127887324348504578610050212447028> (“This is the second time Google has gone down this path. About two years ago Google had conversations with media companies about a similar service, the people [familiar with Google’s talks] said. But those discussions didn’t get very far, one of the people said.”).

⁶⁴ Raymond James Research Report at 2.

⁶⁵ See Jon Brodtkin, *FCC’s Cable Box Rules Won’t Prohibit Extra Ads Around TV Channels*, Ars Technica (Mar. 22, 2016), <http://arstechnica.com/business/2016/03/fccs-cable-box-rules-wont-prohibit-extra-ads-around-tv-channels/> (concluding that “the full text of the notice of proposed rulemaking (NPRM), released after the vote on February 18, shows that there likely won’t be a new rule preventing insertion of additional advertising”).

⁶⁶ See, e.g., Ev Ehrlich, *Why Is the FCC Handing Google Your TV?*, Newsweek (Mar. 18, 2016), <http://www.newsweek.com/why-fcc-handing-google-your-tv-437171> (“Now this new AllVid box will allow [Google] to add ‘what you watch on TV’ to this list of its probes into you and your life. And the FCC – and the politicians who permit it – now want to be their enablers, giving them a free pipeline into private viewing of TV at home?”); Monty Tayloe, *Access to Consumer Data May Be Real Prize in Set-Top Battle, Experts Say*, Communications Daily (Mar. 9, 2016), subscription service (“The consumer data that flows through set-tops would certainly be valuable to third-party developers and would be of extra value to Google, analysts and a consumer data expert told us. Consumer viewing habits are the ‘next untapped market’ for the search company’s data collection efforts, said data analytics consultant Stephane Hamel.” In addition, “Google has struggled to form relationships with programmers, MoffettNathanson analyst Craig Moffett told us. The FCC’s proposals are seen as a way for Google to access consumer viewing data without ‘the heavy lifting’ of negotiations with content companies, Moffett said.”).

Optimum TV customers.⁶⁷ Hulu did not simply gift those rights to Cablevision; those rights were obtained via arms-length negotiations between the parties in which certain terms and conditions – and compensation – were assuredly agreed upon.⁶⁸ If MVPDs must obtain access to OVD content the old-fashioned way (meaning through usual business-to-business negotiations) both today and under the proposed regime, there is no reason why the same should not apply to OVDs accessing MVPD content.

There is much discussion in the NPRM and the Chairman’s Set-Top Box Fact Sheet about protecting MVPDs’ contracts with programmers.⁶⁹ Presentation guidelines, channel lineups and neighborhoods, and other terms and conditions governing the use of content are important parts of licensing agreements. Licensing agreements contemplate many other issues as well: on-demand availability, in-home/out-of-home and device-centric usage rights, advertising guidelines and beyond. Yet the NPRM asserts that no specific rules are necessary to enforce

⁶⁷ Jeff Baumgartner, *Cablevision Offers Hulu on Set-Top Boxes*, Multichannel News (Apr. 7, 2016), <http://www.multichannel.com/news/content/cablevision-offers-hulu-set-top-boxes/403930> (explaining that “[u]nder the integration, subs can access Hulu via the Optimum TV interactive program guide on channel 605 via ‘all current-generation set top boxes’”).

⁶⁸ In testimony before the House Appropriations Committee’s Subcommittee on Financial Services and General Government, Chairman Wheeler remarked, “The information that [MVPDs] send upstream today only talks to a device that they control. We’re saying, open up that so it can talk to other devices just like your smart TV talks to Netflix or Hulu or whatever the case may be and allow for that kind of openness so the consumer has a choice....” Hearing Before the Subcommittee on Financial Services and General Government, 114th Cong. (Mar. 15, 2016) (testimony of Hon. Tom Wheeler, Chairman, FCC), <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394443>. However, smart TVs and other devices do not simply “talk” to Netflix or Hulu – they run Netflix- or Hulu-provided apps that are utilized under the terms of agreements negotiated between the OVD and the smart TV manufacturer. OVD apps are provided on their terms, much like current MVPD apps. Contrary to the Chairman’s suggestion, smart TVs, tablets, and other third-party devices currently on the market do not have unfettered access to Netflix, Hulu or other OVDs outside contractual arrangements.

⁶⁹ See NPRM at ¶¶ 17, 29, 71; FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation (Fact Sheet) (Jan. 27, 2016) at 2, https://apps.fcc.gov/edocs_public/attachmatch/DOC-337449A1.pdf (stating that “[e]xisting content distribution deals, licensing terms, and conditions will remain unchanged”) (“Chairman’s Set-Top Box Fact Sheet”). Moreover, Chairman Wheeler told the Senate Commerce Committee: “That which the cable operators put out should remain sacrosanct and untouched.” John Eggerton, *Wheeler to Senate: Cable Content Is ‘Sacrosanct,’* BROADCASTING & CABLE (Mar. 2, 2016), <http://www.broadcastingcable.com/news/washington/wheeler-senate-cable-content-sacrosanct/154285>.

compliance with such MVPD requirements.⁷⁰ The proposed rules' failure to prevent third parties from repurposing MVPD content in the ways discussed above, or to respect these types of usage requirements, would do nothing to protect MVPD/programmer contracts. In fact, it would have the opposite effect. By setting such limited parameters for the use of MVPD content, the proposal would actually invalidate the terms of these same contracts because it would render MVPDs unable to comply with contractual obligations regarding how that content might be distributed and used. As a result, the Commission's proposal amounts, in essence, to a new compulsory license forcing programmers to allow their content to be used by third parties. And while content providers are typically compensated for the use of their content by the MVPDs with which they negotiate deals, this new compulsory license seemingly includes no compensation for the new and different uses to which third parties will inevitably put their content.

In this way, granting third parties – including OVDs who choose to avail themselves of MVPD content by building a device or app – access to MVPD programming without well-defined compensation or licensing considerations undermines the economics of the Pay TV market. This hurts the program suppliers as well, as a system in which content is freely available in this way devalues content and, as a result, may lead to lower revenues and reduced incentives for those content providers. Allowing third parties to use programming without regard to contractual limitations removes the programmers' ability to determine the destination and use of their content. The ongoing "Golden Age of Television" is built on a copyright licensing regime that allows content providers to determine appropriate uses for their content. The NPRM proposal would threaten this beneficial state by eroding the foundation provided by licensing

⁷⁰ See *supra* note 60 and accompanying text.

agreements. As the Walt Disney Company has warned the Commission, “given their lack of contractual privity with the third party set top box manufacturers, programmers are concerned that any enforcement mechanisms that could be adopted by the FCC as part of this proceeding would not adequately assure adherence to the terms governing the distribution of content to the MVPDs.”⁷¹

C. The NPRM Proposals Are Inadequate to Prevent Security Threats

Because many of the third parties that will benefit from the NPRM proposal stand outside its jurisdiction, the Commission will be unable to enforce its rules against non-MVPD violators. In a presumed attempt to cure this defect, the Commission instead relies on a construct whereby MVPDs might refuse to provide the required three “Information Flows” to third parties deemed to be noncompliant with various aspects of the rules.⁷² However, the Commission’s proposed paradigm puts the onus on MVPDs to police third-party retail devices but gives them little leverage. This approach is likely to prove unnecessarily expensive, opaque to smaller MVPDs, and lacking in effective enforcement. Moreover, this approach is counter to federal law, as Congress has instructed the Commission that it may not jeopardize the security of MVPDs.⁷³

MVPDs currently employ a myriad of security measures to protect content, subscribers’ privacy, the network and the MVPD’s actual service. Working Group 2 of DSTAC explained that MVPD security must contend with all of the following:

⁷¹ *Ex parte* letter of the Walt Disney Company, MB Docket No. 16-42 (Apr. 8, 2016).

⁷² *See, e.g.*, NPRM at ¶ 73 (“[W]e propose to require that MVPDs authenticate and provide the three Information Flows only to Navigation Devices that have been certified by the developer to meet certain public interest requirements.”).

⁷³ *See* 47 U.S.C. § 549(b) (“The Commission shall not prescribe regulations under subsection (a) which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.”).

- threats that arise through circumvention of content license restrictions;
- threats to the chain of trust model that assures secure flow of content from content supplier to the distributor to the consumer;
- threats to privacy protections; and
- threats to the service itself, such as failure to render service, failure to support billing, or interference with advertising.⁷⁴

Unsurprisingly, the security solutions involved in protecting MVPD services are complex and ever-evolving, and include content protection systems like Conditional Access Systems (“CAS”) and Digital Rights Management (“DRM”) systems, “chain of trust” models that protect content as it flows from the content provider to the MVPD and on to the subscriber, and various types of “software and integrated service to assure that services are delivered to consumers as advertised.”⁷⁵

Under the NPRM, MVPDs will be required to select and use security of their own choice.⁷⁶ Third parties will be required to abide by the selected “Compliant Security Systems” too, but the severely limited means by which MVPDs are empowered to control indifference, laxity or outright contempt of relevant security requirements by third parties essentially leaves those non-MVPDs beyond the reach of effective enforcement. This is problematic for many reasons, not least of which is the fact that the technical requirements of the NPRM appear to require MVPDs to open portions of their network to third-party access.⁷⁷ Among other things, granting third parties full access to the requisite “Information Flows” may necessitate MVPDs granting access to VOD servers, entitlements data, content servers, billing records, and more.

⁷⁴ DSTAC Report at 33.

⁷⁵ *Id.* at 28-29, 34-36, 37.

⁷⁶ *See* NPRM at ¶¶ 58-60.

⁷⁷ *See id.* at ¶¶ 38-40 (describing the “Information Flows” that must be made available to third parties).

Having to do this without any real means of preventing abuse and enforcing rules leaves MVPDs and their subscribers unnecessarily vulnerable.

V. THE PROPOSED MANDATES WOULD TRIGGER A CUSTOMER SERVICE NIGHTMARE

The NPRM offers many opportunities to third party device manufacturers and vendors, but does little to hold them accountable to consumers for the devices and apps they provide. Once any customer-facing problem arises, it will be the MVPD, not the unaffiliated device manufacturer, who will be held accountable and liable by its customers for problems and complaints, malware, or other issues not under the MVPD's control. It is obvious that, when faced with an error message, garbled content, or other issues when trying to access MVPD content through a third-party device, an MVPD subscriber will contact the MVPD rather than the third party. Thus, it will fall to the MVPD to receive the complaints and to expend resources in an attempt to resolve them, even if it is the third-party app or device that fails to process the "Information Flows" properly.

Furthermore, the MVPD will find it difficult, if not impossible, to provide adequate customer support for myriad non-MVPD devices or apps. As explained above, small MVPDs have limited resources. There are likely to be a great number of such devices and apps in play, and smaller MVPDs do not have the operating budgets or available personnel to build comprehensive expertise on every downstream device or app, or even track their very existence. Asking smaller MVPDs to field questions, coordinate with third-party device manufacturers and app providers, or initiate truck rolls would put yet another unnecessary burden on entities already in a difficult competitive position, as well as increase monthly service rates to consumers.

VI. PROPOSED SOLUTIONS

At bottom, the Commission's proposals urgently demand and deserve a thorough cost/benefit analysis. As demonstrated herein and as is glaringly obvious to any objective reviewer, the costs, which will inevitably be borne by consumers, will be many and significant. The benefits are far more aspirational, speculative, and very possibly illusory. Insofar as the perceived benefit is lower consumer cost and greater choice by means of being liberated from set-top boxes with monthly lease charges, that is already happening and is accelerating with the introduction and proliferation of yet more and better app-based solutions to replace these boxes. Indeed, there is widespread consensus at both the MVPD and consumer level that the clunky, leased set-top box model is outmoded and deservedly dying.

In light of these market realities, the NPRM's proposals present a solution in search of a problem – and a solution that would *prolong* the existence of set-top hardware and even increase the devices needed, and then freeze that technology in place, is a strange solution indeed. As the Technology Policy Institute has recommended: “If it is serious about its proposal [the Commission] should take the economics seriously, study data from sources other than a congressman’s press release, and provide a coherent explanation of why it believes the status quo results from anticompetitive behavior and how its proposal would fix the problem.”⁷⁸

The best way to resolve the issues that the Commission identifies surrounding navigation devices and video services would be to forbear from new and far-reaching regulation and to instead encourage and foster the dynamic marketplace that is currently unfolding. Consumers are able to access MVPD programming and other features on more devices every day via the apps approach, and the popularity of using apps rather than or in addition to set-top boxes is

⁷⁸ Technology Policy Institute, *An Economic Analysis of the FCC's Set-Top Box NPRM*, filed in MB Docket No. 16-42 (Apr. 19, 2016) at 27.

growing rapidly. Better yet, apps are usable on devices that are already in consumers' hands or located in their homes. Finally, the apps approach moves the industry away from the old hardware-centric paradigm and toward an anywhere-all-of-the-time model that consumers increasingly demand. As such, the Commission should refrain from adopting its proposals, to give the burgeoning apps market the breathing room it needs to continue to grow.

Finally, ITTA supports the request by the Chairman of the House Subcommittee on Communications and Technology and other Members of Congress that the Government Accountability Office (GAO) conduct a study examining the impact of the Commission's proposals on small and independent providers.⁷⁹ Such a study of the likely costs and benefits of the Commission's proposals, which is absent from the NPRM, would serve the valuable objective of illuminating the issues and informing the Commission's way forward in this proceeding.

Respectfully submitted,

James M. Smith
Bradley W. Guyton
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
(202) 973-4288
jamesmsmith@dwt.com
Its Attorneys

/s/ Genevieve Morelli
President
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1519
gmorelli@itta.us

April 22, 2016

⁷⁹ See Letter from Chairman Fred Upton and Rep. Yvette Clark to Gene L. Dodaro, Comptroller General, U.S. Government Accountability Office (Apr. 1, 2016).